

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 8

PARK ENTERPRISE CONSTRUCTION CO., INC.

Employer

and

CASE NOS. 8-RC-16975  
8-CA-38135  
8-CA-38303  
8-CA-38304  
8-CA-38305

LABORERS' LOCAL 574

Petitioner

**ORDER DIRECTING HEARING ON OBJECTIONS  
AND CHALLENGES/ORDER CONSOLIDATING CASES  
AND NOTICE OF HEARING**

Pursuant to a Direction of Election issued by me on February 3, 2009, an election was held on March 5, 2009 among the employees in the following described unit:

*All laborers employed by the Employer on the Employer's construction jobs, projects, and yards, but excluding all other employees, office clerical employees, professional employees, guards and supervisors as defined by the Act.*

The tally of ballots issued after the election shows that of approximately 8 eligible voters, 8 cast ballots, 4 of which were cast for and 4 against the Petitioner. There were 3 challenged ballots, a number sufficient to affect the outcome of the election. The ballots of Michael Birchfield, Nick Kindler, and A.J. Hough were challenged.

Thereafter, the Union filed timely Objections To Conduct Affecting The Results Of The Election, a copy of which was duly served upon the Petitioner. A copy of the Petitioner's Objections is attached.<sup>1</sup>

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<sup>1</sup> The petition was filed on December 8, 2008. *The Ideal Electric and Manufacturing Company*, 134 NLRB 1275 (1961) states that the conduct to be considered is only that which occurred during the critical period, which begins on and includes the date of the filing of the petition and extends through the election. As regards Objection 2, I am aware the alleged termination of Michael Birchfield might have occurred shortly before the Petition was filed. However, relying on *Dresser Industries*, 242 NLRB 74 (1979) I find it is permissible to consider conduct which might have occurred prior to the petition. The Board held in *Dresser* that the rule in *Ideal Electric* does not preclude consideration of pre petition conduct where it "adds meaning and dimension to related post petition conduct."

Pursuant to Section 102.69 of the Board's Rules and Regulations, an investigation of the Objections and Challenges has been conducted, and I make the following findings and conclusions:

### **PREFATORY NOTE**

As a result of the investigation, I have concluded that Objections 2 and 3 and the challenges to the voting eligibility of Nick Kindler, Michael Birchfield, and A.J. Hough raise issues of fact and credibility that cannot be resolved by an *ex parte* proceeding. I am ordering a hearing with respect to these matters and shall order that they be consolidated with the unfair labor practice proceedings in Case Nos. 8-CA-38135, 8-CA-38303, 8-CA-38304, and 8-CA-38305. I hereby approve the Petitioner's request to withdraw Objections 1 and 4.

### **OBJECTIONS AND CHALLENGES**

#### **Objection No. 2 and Challenge to the Ballot of Michael Birchfield**

In Objection 2 the Petitioner alleges that the Employer engaged in conduct affecting the outcome of the election "by discharging or permanently laying off Michael Birchfield." Because Birchfield's name did not appear on the Voter Eligibility list the Board Agent conducting the election challenged his vote.

According to the Employer, Birchfield was terminated for cause on or about November 2, 2008 and was not a member of the bargaining unit on the day of the election. Because it claims Birchfield's termination occurred well before the Petition was filed, the Employer argues that this event cannot be considered objectionable under any possible construction.

The Union filed a charge in Case No. 8-CA-38135 alleging, among other things, that the Employer first unlawfully laid off and thereafter terminated Birchfield in retaliation for his union activities, the alleged unlawful termination having taken place during the critical period. A Complaint and Notice of Hearing issued on March 31, 2009 alleging that Birchfield's layoff and his discharge violated Section 8(a)(1) and (3) of the Act.

This Objection and the Challenge raise substantial and material factual issues which cannot be resolved in an *ex parte* investigation. Moreover, the issues raised are coextensive and intertwined with certain allegations in Case No. 8-CA-38135. Therefore, I will order that this Objection and Challenge be resolved at hearing and consolidated for hearing with the unfair labor practice cases.

#### **Objection No. 3**

In Objection 3 the Petitioner alleges that the Employer engaged in conduct affecting the outcome of the election by "disciplining and /or discharging employees or threatening same for, among other reasons, refusing to take a drug test."

The Union filed a charge in Case No. 8-CA-38303, alleging that the Employer's conduct violated the Act. A Complaint and Notice of Hearing issued in that matter on June 30, 2009,

alleging that the conduct violated Section 8(a)(1) and (3) of the Act. These allegations and coextensive objections raise material issues which cannot be resolved *ex parte*. I will order that this Objection be resolved at hearing and consolidated with the unfair labor practice proceedings.

### **Challenge to the Ballots of Nick Kindler and A.J. Hough Nick Kindler**

During the election the Board Agent challenged the ballot of Nick Kindler because his name did not appear on the Voter Eligibility List. According to the Employer it terminated Kindler for cause on August 22, 2008 and, therefore, he was not eligible to vote in the election. The Petitioner alleges that Kindler was terminated in retaliation for his union activity. As noted above, Complaint issued in Case No.8-CA-38135 alleging that Kindler was terminated in retaliation for his union activity.

The challenge raises substantial and material factual issues which cannot be resolved *ex parte*. Because the issues raised by the challenge are coextensive and closely connected with certain allegations in the unfair labor practice proceeding, I shall order that the challenge be resolved at a hearing that it be consolidated for hearing with the unfair labor practice proceedings.

### **A.J. Hough**

The Board Agent challenged the ballot of A.J. Hough because his name did not appear on the Voter Eligibility List. The Petitioner also challenged A. J. Hough because allegedly he is not a member of the bargaining unit.

According to the Employer, Hough is a laborer performing work in and around the “yards” and as such should be included in the bargaining unit. The Employer also asserts that Hough was eligible to vote under the *Daniel*<sup>2</sup> formula.

The Employer supplied payroll records which suggest that Hough was eligible to vote under the *Daniel* formula. However, evidence has also been adduced which suggests that Hough is a subcontractor, thus raising additional questions regarding his employment status and voter eligibility.

Finally, the undisputed evidence reveals that Hough is the nephew of Employer owner Eric Park. Hough’s familial relationship to Park raises additional issues including whether he has a sufficient community of interest to be included in the bargaining unit.<sup>3</sup>

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<sup>2</sup> The Employer refers to the eligibility formula set forth in *Daniel Construction 133 NLRB 264 (1961)* and *Steiny and Co., 308 NLRB 1323 (1992)* pertaining to the construction industry. In the Direction of Election it was determined that the *Daniel* formula would be used in determining voter eligibility.

<sup>3</sup> The Board utilizes an “expanded community of interest test” to determine whether relatives of owners of closely held corporations should be excluded from the unit. See *Iberia Road Markings Corp. 353 NLRB No. 101 (2009)* citing *Futuramilk Industries, 279 NLRB 185 (1986)* which cites *NLRB v. Action Automotive, 469 U.S. 490 (1985)*; and *R & D Trucking, 327 NLRB 531 (1999)*.

Since the challenge raises material issues of fact and law which cannot be resolved in an *ex parte* investigation, I will order that the challenge be resolved at hearing and that said hearing be consolidated with the unfair labor practice proceedings.

### **CONCLUSION**

I conclude that Objections 2 and 3 and the challenges to the ballots of Mike Birchfield, Nick Kindler, and A.J. Hough present issues of fact and credibility that cannot be resolved *ex parte*. I will order that the issues raised by these objections and challenges be consolidated for hearing with the unfair labor practice cases.

### **ORDER**

**IT IS ORDERED** that the issues raised by the Petitioner's Objection Nos. 2 and 3 and the challenges to the ballots of Mike Birchfield, Nick Kindler, and A. J. Hough be resolved at a hearing before a duly designated administrative law judge.

It having been charged in Case Nos. 8-CA-38135-1, 8-CA-38303, 8-CA-38304, and 8-CA-38305 by the Laborers' Local 574 that the Park Enterprise Construction Co., Inc. has engaged in, and is engaging in, unfair labor practices affecting commerce as set forth and defined by the National Labor Relations Act, as amended, 29 U.S.C. Section 15 *et. seq.*, and a Complaint having issued on March 31, 2009, in Case No. 8-CA-38135 and an Amended Consolidated Complaint having issued on June 30, 2009 in Case Nos. 8-CA-38135, 8-CA-38303, 8-CA-38304, and 8-CA-38305, the matters contained herein have been scheduled for a hearing before an administrative law judge of the National Labor Relations Board at a date, time and place to be designated later.

**IT IS FURTHER ORDERED**, pursuant to Section 102.33 and 102.72 of the Board's Rules and Regulations, Series 8, as amended, that Case No. 8-RC-16975 be consolidated for hearing with Case Nos. 8-CA-38135-1, 8-CA-38303, 8-CA-38304, and 8-CA-38305 at the same time and place and they hereby are consolidated for purposes of hearing before an administrative law judge. Form NLRB-4348 is attached.

**WHEREFORE**, the General Counsel of the National Labor Relations Board, on behalf of the Board, has caused the foregoing Order Consolidating Cases to be signed and issued by the Regional Director of Region 8 on this 2<sup>nd</sup> day of July, 2009.

/s/ Frederick J. Calatrello

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Frederick J. Calatrello, Regional Director  
National Labor Relations Board  
Region 8

Attachment

UNITED STATES GOVERNMENT  
NATIONAL LABOR RELATIONS BOARD  
NOTICE

**CASE NOS. 8-RC-16975, 8-CA-38135, 8-CA-38303, 8-CA-38304 and 8-CA-38305**

The issuance of the notice of formal hearing in this case does not mean that the matter cannot be disposed of by agreement of the parties. On the contrary, it is the policy of this office to encourage voluntary adjustments. The examiner or attorney assigned to the case will be pleased to receive and to act promptly upon your suggestions or comments to this end. An agreement between the parties, approved by the Regional Director, would serve to cancel the hearing.

However, unless otherwise specifically ordered, the hearing will be held at the date, hour, and place indicated. Postponements ***will not be granted*** unless good and sufficient grounds are shown ***and*** the following requirements are met:

1. The request must be in writing. An original and two copies must be filed with the Regional Director when appropriate under 29 CFR 102.16(a) or with the Division of Judges when appropriate under 29 CFR 102.16(b).
2. Grounds thereafter must be set forth in ***detail***;
3. Alternative dates for any rescheduled hearing must be given;
4. The positions of all other parties must be ascertained in advance by the requesting party and set forth in the request; ***and***
5. Copies must be simultaneously served on all other parties (*listed below*), and that fact must be noted on the request.

Except under the most extreme conditions, no request for postponement will be granted during the three days immediately preceding the date of hearing.

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